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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 712

DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, a Minnesota corporation,
Petitioner-Appellant,

vs.

MICHIGAN CORPORATION AND SECURITIES COMMISSION and
MICHIGAN CORPORATION TAX APPEAL BOARD,
Defendants-Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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The Mileage Through Which Interstate Freight is Transported in the State of Michigan is not an Element that can be Considered in Fixing the Tax Exacted by the State for its Privilege of Transacting Business Within the State

The principal reason why appellant files this short brief in opposition to the motion to dismiss of the appellees, is to discuss the decision of this Court in the case of *Railway Express Agency v. Virginia* which was decided on February 24th last after the filing of the jurisdictional statement.

As explained at page 15 of the jurisdictional statement, the point which this appellant seeks to raise is this: where a corporation is engaged in both interstate and intrastate commerce, there are certain elements of the interstate process which are such essential and integral parts thereof that they cannot be used in any way at all in fixing the fee which a state may exact from this corporation for the privilege of engaging in intrastate commerce within the boundaries of that state. And, of course, it is further contended that the transportation of freight in interstate commerce is such an inadmissible element. At page 11 of the motion to dismiss, counsel for appellees state that this argument is novel, but actually, that is not so.

The point is expressly stated in *Michigan-Wisconsin Pipe Line Company v. Calvert*, 347 U. S. 157 and in *Railway Express Agency v. Virginia*, 347 U. S. 359. These cases are cited on pages 13 and 14 of the jurisdictional statement and appropriate quotations from the opinions of this Court are there printed. In fact, this is a very old rule. Admittedly, some matters connected with interstate commerce may be used in a formula for allocating the paid-up capital and surplus of a corporation to a state

in which it does business, for the purpose of fixing its franchise tax: an instance of this is property used in the conducting of interstate commerce. But the mileage through which materials are transported in interstate commerce cannot be considered for this purpose.

This point is illustrated by the case of *State Tax on Railway Gross Receipts*, 15 Wal. 284, cited by appellees on page 11 of the motion to dismiss, and by its companion case, the case of the *State Freight Tax*, 15 Wal. 232. Neither case involved a franchise tax, or an allocation formula, but the same point or principle is involved as is involved in the present case. In the *Freight Tax* case, the State of Pennsylvania had imposed a tax on each ton of freight transported over the tracks of railroads in that state. This tax was held bad as a direct tax on interstate commerce. The Court said, at page 275:

> Beyond all question the transportation of freight or the subjects of commerce for the purpose of exchange or sale is a constituent of commerce itself."

In the *Gross Receipts Tax* case, the state of Pennsylvania had levied a tax on the gross receipts of railroads. The constitutionality of the tax was attacked insofar as it applied to receipts from interstate commerce. This tax was upheld. It was considered that it was not a tax on the interstate process itself, but instead on the money received on account thereof which presumably had been mixed with other funds of the recipient railroad. The Court said at page 292:

> "We have recently decided in another case between the parties to the present suit, that freight transported from state to state is not subject to state taxation because thus transported."

The same principle is illustrated by the Railway Express cases recently before this Court: *Railway Express Agency v. Virginia*, 347 U. S. 359 and *Railway Express Agency v. Virginia* decided February 24, 1959. The latter case was decided subsequent to the filing of the jurisdictional statement herein. In the first of these cases Virginia had levied a license tax on the business of the Express Agency. The tax was a percentage of the receipts from business originating in or ending in or passing through Virginia. It was designated as a tax on the privilege of doing business in Virginia. This Court held that the tax was repugnant to the commerce clause of the Constitution. In the second case, just decided, the tax is no longer a tax on the privilege of doing busines in Virginia, but instead is in lieu of all other taxes on intangible property and taxes on rolling stock. This tax is upheld, it is not a tax on interstate commerce, instead it is a tax in lieu of a property tax.

Here let us emphasize that the Supreme Court of Michigan has expressly and carefully held that the tax involved in the case at bar is a tax on the right of appellant to carry on its intrastate business in the State of Michigan. See page 9 of the jurisdictional statement. It is in not a property tax, or a tax in lieu of a property tax.

Now suppose that in these cases the tax had not been a percentage of the receipts from business originating or ending in Virginia or passing through it, but instead had been based on the mileage traveled in Virginia by the articles whose transportation constitutes this business. It is believed that this Court would have held such a tax unconstitutional, and that for the same reason it should hold the tax in the instant case to be unconstitutional.

It is submitted that if the tax in this case is upheld, it will mean that today this Court holds that the states can tax interstate commerce directly—provided, of course, that there is no discrimination; and that for this reason the question here involved merits a full hearing.

Respectfully submitted,

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